Koperasi Keretapi Bhd v Menteri Kewangan Malaysia & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01–190 OF 2010
SYED AHMAD HELMY, ABDUL WAHAB PATAIL AND ABDUL AZIZ ABD RAHIM JJCA
11 DECEMBER 2012

Civil Procedure — Declaration — Application for — Validity of Acts — Applicability of s 43 of the Malaysian Co-operative Societies Commision Act 2007 ('Act') — Whether Acts invalid pursuant to art 4(1) of the Federal Constitution — Whether there was deprivation of use of money — Whether to put money into co-operative deposit account under s 43 or contribute to Central Liquidity Fund under s 42 of the Act

The present appeal arose when the High Court dismissed an originating summons ('encl 1') by the appellant which sought declarations that: ss 43(1) and 42(2) of the Malaysian Co-operative Societies Commission Act 2007 ('Act') were inconsistent with art 13(2) of the Federal Constitution ('Constitution') and therefore invalid pursuant to art 4(1) of the Constitution; that s 42(1) of the Act was invalid under art 4(1) of the Constitution since the money acquired under s 42(1) ought to be paid to the Constitution fund pursuant to art 97 of the Constitution; that s 54 of the Act was inconsistent with art 5(1) and (3) of the Constitution and therefore invalid under art 4(1) of the Constitution; and that s 43(2) of the Co-operative Societies Act 1993 ('CSA') was inconsistent with art 10(1) and not excepted by art 10(2), (3), or (4) of the Constitution. In the present appeal, the appellant raised questions of whether it has to put its money into the co-operative deposit account under s 43 of the Act or contribute to the Central Liquidity Fund under s 42. The appellant sought to have ss 42(1) and (2), 43(1) and 54, provisions which would make every offence under the Act, the CSA or any other written law enforced by the Commission as well as ss 43(2) of the CSA a seizable offence, declared to be invalid under art 4(1) of the Constitution.

Held, dismissing the appeal with costs:

(1) Section 43 required funds not immediately needed for operations or investments to be put into the co-operative deposit account. Since s 43 applied only to funds not immediately needed for operations or investments, there was no deprivation of the use of its money. If the money was not immediately required for its operations or its investments, the question loomed largely as to the reason for the objection. The object of the co-operative deposit account was to provide

for where co-operative moneys not immediately required for operations or investments might be safely kept and avoid misuse and loss. As soon as that money was immediately required for operations or investments, it no longer fell under the definition under s 43 and might not be retained by the Commission. The argument bore no merit (see paras 4–6).

(2) Since there was no deprivation of use of its money, it followed that the submission that s 43 deprived the appellant of the use of its money without adequate compensation was also without merit. The provision was not in breach of art 13(2) of the Constitution forbidding compulsory acquisition of property without adequate compensation (see para 7).

(3) Section 43(2) bestowed the Commission the power, with the prior written approval of the Minister, to regulate the scope, operation and management of the co-operative deposit account. Read with art 13(2), it followed that the co-operative deposit account must be managed so that there would be no loss to the co-operative. But until it had been shown that the Commission or the Minister was using the funds of the co-operative in the co-operative account for the Commission or the Government without adequate compensation, it could not be said the said s 43 was in breach of art 13(2) (see para 9).

(4) The submissions relating to other funds of the Commission were irrelevant to the consideration to the true issue put before the court. By forcing co-operatives to deposit their money in this way for the use of the Commission, s 43 deprived co-operative societies of the use of their money without adequate compensation (see para 11).

(5) The submission that the payments were contrary to art 97 contradicted the very objection against the payments to the Commission. Payments under art 97 were into the account of the Federation, while the payments objected to were not so intended, but were maintained as an independent pool of funds in respect of and for the assistance of co-operatives (see para 12).

(6) Section 43(2) of the CSA concerned the criteria for qualification or eligibility to be appointed as a member of the board of a co-operative society. As such, it was not a restriction of any of the rights under art 10(1). It did not prevent the citizens of Malaysia from becoming the members of the appellant (see para 15).

[Bahasa Malaysia summary

Rayuan ini berbangkit apabila Mahkamah Tinggi menolak saman pemula ('lampiran 1') oleh perayu yang mana memohon perisytiharan bahawa: ss 43(1) dan 42(2) Akta Suruhanjaya Koperasi Malaysia 2007 ('Akta') tidak konsisten dengan perkara 13(2) Perlembagaan Persekutuan ('Perlembagaan') dan justeru adalah tidak sah menurut perkara 4(1) Perlembagaan; bahawa

s 42(1) Akta adalah tidak sah di bawah perkara 4(1) Perlembagaan memandangkan wang yang diperoleh di bawah s 42(1) seharusnya dibayar kepada dana Perlembagaan menurut perkara 97 Perlembagaan; bahawa s 54 Akta adalah tidak konsisten dengan perkara 5(1) dan (3) Perlembagaan dan justeru adalah tidak sah di bawah perkara 4(1) Perlembagaan; dan bahawa s 43(2) Akta Koperasi 1993 ('AK') adalah tidak konsisten dengan perkara 10(1) dan tidak dikecualikan oleh perkara 10(2), (3) atau (4) Perlembagaan. Di dalam rayuan ini, perayu membangkitkan persoalan sama ada ia telah memasukkan wangnya ke dalam akaun deposit koperasi di bawah s 43 ASKM atau menyumbang kepada Dana Likuidasi Pusat di bawah s 42. Perayu memohon supaya ss 42(1) dan (2), 43(1) dan 54, peruntukan yang mana menjadikan kesemua kesalahan di bawah Akta, AK atau mana-mana undang-undang bertulis yang dikuatkuasakan oleh Koperasi dan juga ss 43(2) AK sebagai kesalahan boleh ditangkap, diisytiharkan sebagai tidak sah di bawah perkara 4(1) Perlembagaan.

Diputuskan, menolak rayuan dengan kos:

(1) Seksyen 43 memerlukan dana-dana yang tidak serta-merta diperlukan untuk operasi-operasi atau pelaburan untuk dimasukkan ke dalam akaun deposit koperasi. Memandangkan s 43 diguna pakai hanya kepada dana-dana yang tidak serta-merta diperlukan untuk operasi-operasi atau pelaburan, tidak terdapat sebarang penafian penggunaan wang. Sekiranya wang tersebut tidak diperlukan secara serta-merta untuk operasi-operasi atau pelaburannya, persoalan berkisar sebahagian besarnya mengenai sebab untuk bantahan tersebut. Tujuan akaun deposit koperasi adalah untuk menyimpan dengan selamat wang koperasi yang tidak serta-merta diperlukan untuk operasi atau pelaburan dan menghindar salah guna dan kehilangan. Sejurus selepas wang diperlukan untuk operasi atau pelaburan, ia bukan lagi terangkum di bawah definisi di bawah s 43 dan tidak akan disimpan oleh Suruhanjaya. Pertikaian tersebut tidak mempunyai sebarang merit (lihat perenggan 4–6).

(2) Memandangkan tidak terdapat sebarang penafian penggunaan wang, hujahan bahawa s 43 telah menafikan perayu penggunaan wangnya tanpa sebarang pampasan yang berpatutan juga adalah tanpa merit. Peruntukan tersebut tidak bercanggah dengan perkara 13(2) Perlembagaan yang mana menghalang pemerolehan harta wajib tanpa pampasan yang berpatutan (lihat perenggan 7).

(3) Seksyen 43(2) memberikan Suruhanjaya kuasa, tanpa kebenaran bertulis terdahulu oleh Menteri, untuk menggubal skop, operasi dan pengurusan akaun deposit koperasi. Dibaca bersama perkara 13(2), akaun deposit koperasi hendaklah diuruskan supaya tidak terdapat sebarang kerugian kepada koperasi. Tetapi sehingga ianya dapat ditunjukkan bahawa

Suruhanjaya atau Menteri telah menggunakan dana koperasi di dalam akaun koperasi untuk Suruhanjaya atau kerajaan tanpa pampasan berpatutan, ia tidak boleh dikatakan s 43 adalah bercanggah dengan perkara 13(2) (lihat perenggan 9).

(4) Hujahan-hujahan berkenaan dengan dana Suruhanjaya yang lain adalah tidak relevan untuk pertimbangan bagi isu sebenar di hadapan mahkamah. Dengan memaksa koperasi-koperasi untuk mendepositkan wang mereka dengan cara ini untuk kegunaan Suruhanjaya, s 43 menafikan koperasi daripada menggunakan wang mereka tanpa pampasan yang berpatutan (lihat perenggan 11).

(5) Hujahan bahawa bayaran adalah berlawanan dengan perkara 97 adalah bercanggah dengan tujuan bayaran kepada Suruhanjaya. Bayaran di bawah perkara 97 adalah ke dalam akaun Persekutuan, sementara bayaran yang diwajarkan adalah tidak sedemikian, tetapi dikendalikan sebagai dana tersendiri berkenaan dengan dan untuk bantuan kepada koperasi (lihat perenggan 12).

(6) Seksyen 43(2) AK mementingkan kriteria untuk kelayakan untuk dilantik sebagai ahli lembaga koperasi. Oleh demikian, ia bukanlah batasan bagi sebarang hak-hak di bawah perkara 10(1). Ia tidak menghalang warganegara Malaysia untuk menjadi ahli-ahli kepada perayu (lihat perenggan 15).]

Notes

For cases on application for, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 2664–2698.

Cases referred to

Asom Rastrabhasha Prachar Samiti & Ors v State of Assam & Ors AIR 1989 SC 2126, SC (refd)

Kunnathat Thathunni Moopil Nair v The State of Kerala and another 1961 SCR (3) 77, SC (refd)

S Azeez Basha v Union of India AIR 1968 SC 662, SC (refd)

Legislation referred to

Co-operative Societies Act 1993 s 43(2)

Federal Constitution arts 4(1), 5(1), (3), 10(1), (2), (3), (4), 13(2), 97

Malaysian Co-operative Societies Commission Act 2007 ss 42, 42(1), (2), 43, 43(1), 54

Appeal from: Suit Application No R1–24–01 of 2008 (High Court, Kuala Lumpur)

A Kanesalingam (Azira Aziz with him) (Kanesalingam & Co) for the appellant.

Munahyza bt Mustafa (Nadia Hanim bt Mohd Tajuddin with her) (Senior Federal Counsel, Attorney General's Chambers) for the respondents.

Abdul Wahab Patail JCA:

[1] The High Court dismissed with no order as to costs, an originating summons by Koperasi Keretapi Bhd ('the appellant co-operative') dated 2 January 2008 (encl 1), seeking the following declarations:

(a) that ss 43(1) and 42(2) of the Malaysian Co-operative Societies Commission Act 2007 ('Act 665') ('MCSC Act') is inconsistent with art 13(2) of the Federal Constitution ('FC') and therefore invalid pursuant to art 4(1) of the Constitution;

(b) that s 42(l) of the MCSC Act is invalid under art 4(1) of the FC since the money acquired under that s 42(1) ought to be paid to the FC fund pursuant to art 97 of the FC;

(c) that s 54 of the MCSC Act is inconsistent with art 5(1) and (3) of the FC therefore invalid under art 4(1) of the Constitution; and

(d) that s 43(2) of the Co-operative Societies Act 1993 ('Act 502') (as amended by the Co-operative Societies Amendment Act 2007 ('Act A1297') ('the new s 43(2) of the (Act 502)/A1297') is inconsistent with art 10(1) and not excepted by art 10(2), 10(3), or 10(4) of the FC.

[2] The appellant co-operative appealed to this court.

[3] The appellant co-operative questions whether it has to put its money into the co-operative deposit account under s 43 of the MCSC Act or contribute to the Central Liquidity Fund under s 42. It sought to have ss 42(1) and (2), 43(1) and 54, a provision which makes every offence under the MCSC Act, the Co-operative Societies Act 1993 or any other written law enforced by the Commission as well as s 43(2) of the Co-operative Societies Act 1993 ('Act 502') a seizable offence, declared to be invalid under art 4(1) of the Federal Constitution.

[4] Section 43 requires funds not immediately needed for operations or investments to be put into the co-operative deposit account.

[5] Since s 43 applies only to funds not immediately needed for operations or investments, there is no deprivation of the use of its money. If the money is not immediately required for its operations or its investments, the question looms largely as to the reason for the objection. We wondered what on earth can the money can be put to, other than the co-operatives' operations or investments, such that it can be said the appellant co-operative is being deprived of its use.

[6] The object of the co-operative deposit account is to provide for where co-operative moneys not immediately required for operations or investments may be safely kept and avoid misuse and loss. As soon as that money is immediately required for operations or investments, it no longer falls under the definition under s 43 and may not be retained by the Commission. The argument bears no merit.

[7] Since there is no deprivation of use of its money, it follows that the submission by Mr A Kanesalingam that s 43 deprived the appellant co-operative of the use of its money without adequate compensation is also without merit. The case of *Kunnathat Thathunni Moopil Nair v The State of Kerala and another* 1961 SCR (3) 77 is of no application to the present case. That being the case, the provision is not in breach of art 13(2) of the Federal Constitution forbidding compulsory acquisition of property without adequate compensation.

[8] We next consider art 13(2) in respect of the submission of the use of the co-operative's property without adequate compensation.

[9] Section 43(2) gives the Commission the power, with the prior written approval of the Minister, to regulate the scope, operation and management of the co-operative deposit account. Read with art 13(2) it follows the co-operative deposit account must be managed so that there is no loss to the co-operative. But until it is shown that the Commission or the Minister is using the funds of the co-operative in the co-operative account for the Commission or the government without adequate compensation, it cannot be said the said s 43 is in breach of art 13(2).

[10] It was submitted that 'With respect, the learned judge erred in holding that subsidiary legislation or guidelines could fill in the gaps in the legislation to attempt to transform an unconstitutional law into a constitutional one'. The submission was made in support of the argument that by the MCSC Act Parliament abdicated its legislative power to the Commission. In light of the fact there is nothing in the MCSC Act that makes the delegation of power to the Commission make regulations with the prior written approval of the Minister absolute, it cannot be an act of abdication of Parliament's legislative power. We find no merit in the submission.

[11] The lengthy submissions relating to other funds of the Commission are irrelevant to the consideration to the true issue put before us, which counsel had properly summed up in his gist of the appellant's arguments, that by forcing co-operatives to deposit their money in this way for the use of the Commission, s 43 deprives co-operative societies of the use of their money without adequate compensation.

[12] The submission that the payments are contrary to art 97 contradicts the very objection against the payments to the Commission. Payments under art 97 are into the account of the Federation, whereas the payments objected to are not so intended, but are maintained as an independent pool of funds in respect of and for the assistance of co-operatives.

[13] Article 5(1) of the Federal Constitution provides that no person shall be deprived of his life or personal liberty save in accordance with law. Article 5(3) provides that where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice. Since s 54 merely makes the offences to be seizable offences, it does not contradict art 5(1) or art 5(3).

[14] Article 10(1), in respect of the right to freedom of speech and expression, to assemble peaceably and without arms, and to form associations, is subject to cll (2)–(4). Paragraphs (a)–(c) of cl (2) authorises Parliament to impose by law such restrictions as it deems necessary or expedient on the various grounds stated therein on the rights under paras (a)–(c) of cl 1. Clause 3–4 are not material to the matter before us.

[15] Section 43(2) of the Co-operative Societies Act 1993 ('Act 502') concerns the criteria for qualification or eligibility to be appointed as a member of the board of a co-operative society. As such, it is not a restriction of any of the rights under art 10(1). It does not prevent the citizens of Malaysia from becoming the members of the appellant co-operative. Its counsel cited *S Azeez Basha v Union of India* AIR 1968 SC 662 at p 675 where the Supreme Court of India said that if the Muslim community themselves were to form an institution, they would have the right to manage it. It was submitted that the constitutional right to form associations will be an ineffective fundamental right if the members of the association cannot manage the association they form according to law. A more recent case expressing a similar view is *Asom Rastrabhasha Prachar Samiti & Ors v State of Assam & Ors* AIR 1989 SC 2126. With respect, we do not see how s 43(2) of the Co-operative Societies Act 1993 ('Act 502') deprives the right of the members of the co-operative, as opposed to ineligible individuals, from managing their co-operative.

[16] For the foregoing reasons, we find no merit in the appeal and dismiss it with costs. The appeal was undertaken and it was explained in the interests of co-operatives generally. It placed an additional burden upon the respondents. We awarded costs in the sum of RM10,000.

Appeal dismissed with costs.

Reported by Afiq Mohamad Noor